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In the

Supreme Court of the United States

October Term, 1950.

No. 387.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., and WALTER A. SAID, as agent for UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., *Petitioners.*

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS AND WALTER A. SAID.

The Board in its Brief in Opposition concedes that the reasoning upon which its order in the instant case was based "was not correct." Thus, the Board now agrees with petitioners that Section 8(c) is applicable to Section

8(b)(4)(A) and that therefore inducement or encouragement of employees to strike or engage in a concerted refusal to work, whatever the object thereof, is not an unfair labor practice unless accomplished by means other than the expression of views, argument or opinion which contains no threat of reprisal or force or promise of benefit (Br. in Opp., pp. 15-16). The Board does not dispute that in this case it found as a fact that all of the acts of inducement or encouragement shown by the record consisted of merely the expression of views, argument or opinion which contained no threat or promise. The Board, however, tries to minimize these findings by suggesting that they were based upon a misreading of this Court's decisions respecting picketing (Br. in Opp., pp. 15-17).

Whatever the reason for the Board's error, there can be no question but what the judgment below must be reversed. The character of the Board's error can be of importance only in determining whether the reversal shall be accompanied by a direction to set aside the Board's order and to remand to the Board to decide the case on a correct theory or whether the reversal shall be with directions to set aside the Board's order without any remand. Because of the Board's findings of fact in this case no remand to the Board is justified but only a reversal with directions to set aside the Board's order. We believe that a reversal with directions to set aside can properly be made on the basis of the Board's concession or error without the necessity for passing on either the mootness or commerce issues, which, of course, go to the jurisdiction of this Court.

A reversal is the necessary consequence of the Board's confession that its reasoning here was erroneous. It is a well-settled principle of law that a court cannot enforce an order of an administrative agency which is based on erroneous reasoning, irrespective of whether it would have

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been possible for the agency by correct reasoning to reach the same order. *Securities and Exchange Commission* v. *Chenery Corp.*, 316 U. S. 80, 87-95; Eastern-Central Motor *Carriers Ass'n* v. *United States*, 321 U. S. 194; *City of Yonkers* v. *United States*, 320 U. S. 685, 691-692; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-489.

No remand to the Board is permissible because the Board cannot attack its own findings that all of the conduct of petitioners constituted the expression of views, argument or opinion without threat or promise. These findings, upon the Board's concession that Section 8(c) applies to Section 8(b)(4)(A), require setting aside the Board's order. These findings of the Board are factual in character, based upon a full and complete litigation of whether petitioners' conduct was the expression of views, argument or opinion without threat or promise (see Pet. for Cert., pp. 26-31). The Trial Examiner found that the picketing was the expression of views, argument or opinion which contained an implied threat of discipline of any union member who crossed the picket line (R. 49-59). The Board affirmed the finding that the picketing here was the expression of views, argument or opinion, but reversed the finding that it contained a threat (R. 84, n. 35, 97, n. 57). The Trial Examiner found that the unfair list was a "non-coercive argument" (R. 51). The Board affirmed this finding (R. 91). The Trial Examiner did not make any finding as to the character of the conversation between Said and Monroe because he found it did not involve inducement or encouragement (R. 52). The Board reversed this finding but held that the inducement or encouragement found was accomplished by the expression of views, argument or opinion without threat or promise (R. 84, n. 35, 91-92).

The Board opposes certiorari on the ground that "a case in which the findings are based upon a theory which the Board no longer follows would hardly seem to be the most appropriate vehicle" (Br. in Opp., p. 17). If the erroneous character of the Board's decision in this case makes this, from the Board's point of view, an inappropriate vehicle for settling future law, the proper solution would, we submit, be a grant of certiorari accompanied by a summary reversal with directions to set aside the Board's order.

If this Court should not agree with our suggestion that the proper disposition for this case would be the grant of certiorari accompanied by a summary reversal, it is our position that, despite the Board's confession of error with respect to the applicability of Section 8(c), the case presents numerous important questions deserving decision by this Court. We desire herein to show that the positions taken by the Board in its Brief in Opposition, rather than militating against the necessity for review by this Court, emphasize the great importance of consideration by this Court.

Free Speech Issues.

1. While the Board now agrees with petitioners that Section 8(c) qualifies Section 8(b)(4)(A), it assumes that Section 8(c) affords no limitation not already imposed by the First Amendment (Br. in Opp., pp. 15-17). But, as we pointed out in our petition for certiorari (pp. 25-26), Congress rejected a formulation of Section 8(c) which was no broader than the First Amendment and adopted a broader formulation because it wanted to afford greater protection for free speech than was granted by the First Amendment. Whether the Board can properly construe Section 8(c) contrary to this legis-

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lative history, as well as the plain meaning of its terms, requires review by this Court. We believe, as we have already stated herein, that under either interpretation, the findings here made that all petitioners' activities were protected by Section 8(c) require a reversal.

If a reversal is not granted summarily, the Court would be faced with the difference in the construction of Section 8(c) which is posed by the position taken by the Board in its Brief in Opposition when it quotes with approval its statement in *Denver Building and Construction Trades Council and Henry Shore,* 90 N. L. R. B., No. 224, that "there is nothing in the Act or in its legislative history to indicate that Congress intended to go beyond the protective scope of the Constitution" (Br. in Opp., p. 17, n. 10).

The cases upon which the Board relies bring out clearly the differences between Section 8(c) and the First Amendment. The first of these is *Giboney* v. *Empire Storage Co.,* 336 U. S. 490 (Br. in Opp., pp. 15-17). In that case this Court relied heavily upon the fact that under the union constitution any member crossing a picket line could be fined or suspended (at pp. 493, 498, 500, n. 6, 504). This Court, therefore, found that the picket line constituted a threat that any union member crossing the picket line would lose his union membership (at p. 498). This Court's opinion was based upon the theory stated in a concurring opinion in *Thomas* v. *Collins,* 323 U. S. 516, 537-538, which this Court quoted with approval in the *Giboney* case (at p. 503, n. 6): "But once [a speaker] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee." Before Section 8(c) the Board relied heavily upon the employer's control over the jobs

of employees in finding employer anti-union speech beyond the protection of the First Amendment. This Court approved in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479, 319 U. S. 533, 537-539. Because of Congressional disapproval of this policy Congress forbade the reliance upon "power over jobs" as the basis of a finding of unfair labor practices unless there was a threat or promise to use that power. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24; 93 Cong. Rec. 4893, 6443-6444, 6859.

Because of Section 8(c), the chief issue litigated at the trial in this case was whether the picketing here involved implied such a threat. (See Pet. for Cert., pp. 26-30.) The Trial Examiner found it did (R. 49-50). The Board unanimously reversed this finding (R. 90, n. 49, 97, n. 37, 110). To the extent that *Giboney* rested on a theory of threat arising from picketing Section 8(c) makes it inapplicable here. To the extent that *Giboney* rested on a finding of threat, the contrary finding here makes *Giboney* inapplicable. The same distinction applies to *Hughes* v. *Superior Court*, 339 U. S. 460; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470; *Building Service Employees* v. *Gazzam*, 339 U. S. 532 (cited Br. in Opp., p. 15). As we pointed out in our petition for certiorari (pp. 34-35), each of these cases involved picketing which, besides being communicative, was also coercive. If the finding of coercion rested on a theory, Section 8(c) makes the case inapplicable. If it rested on a finding of fact, the contrary finding here makes the cases inapplicable.

The case *Eastern States Retail Lumber Dealers Ass'n* v. *United States*, 234 U. S. 600, is the only case relied upon by the Board to sustain its construction of Section

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8(c) as applied to the non-picketing unfair labor practices here found (Br. in Opp., p. 17). Nowhere in the opinion in the *Eastern* case nor in the reported arguments is there even an indirect mention of any free speech issue or the First Amendment. The only issue there was the sufficiency of the evidence to sustain a finding of conspiracy to restrain trade. In *United States* v. *Real Estate Boards,* 339 U. S. 485, 489, the *Eastern* case is cited for the proposition that "Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." This, of course, was just the theory Congress meant to ban by Section 8(c).

2. The findings here made that none of the picketing activities were in any respect coercive (R. 90, n. 49, 97), that the unfair list was a "non-coercive argument" (R. 50-51, 91), and that the conversation inducing Monroe to quit contained no threat (R. 91-92, 84 n. 35), preclude sustaining the constitutionality of the Board's order on the authority of any of the cases relied upon by the Board (Br. in Opp., p. 15). Nor does the Board even attempt to explain how its findings as to the unfair list and the alleged inducing of Monroe to quit may be squared with Section 8(c). Nor does the Board offer any explanation of its barring of the use of all channels of communication, when in the cases it relies upon the limited ban on picketing is justified by the presence of other channels of communication. (See Pet. for Cert., p. 35.)

Construing Words "Strike" and "Concerted Refusal."

3. The Board cites no cases arising under the Act for its statement that "The words 'employees of any employer' as used in Section 8(b)(4) include single employees of several employers as well as several employees

of a single employer" (Br. in Opp., p. 22, n. 15). Indeed, the only Board decisions are to the contrary. See *Matter of Denver Building Trades Council (Gould & Preisner)*, 82 N. L. R. B. 1195, 1197-1198, and cases there cited.

Two district courts have recently held that picketing addressed to those who approach the picket line to make deliveries does not induce or ecourage strikes or concerted action but only the individual action of each separate person coming with a delivery. In *Brown* v. *Retail Shoe & Textile Salesmen's Union*, 89 F. Supp. 207, 210 (N. D. Calif. S. D.), the court said:

> "it is doubtful that the communication between pickets of Union A, patrolling in front of Employer X's establishment, and employees of Employer Y who happen to approach X's store to make deliveries or perform services, can be considered encouragement or inducement to strike or engage in *concerted* refusal to so deliver or serve. The evidence in this case shows that any refusal to deliver or perform services was apparently an individual matter on the part of the employees concerned." (Emphasis in original.)

To the same effect see *Elliott* v. *Amalgamated Meat Cutters, Inc.*, 91 F. Supp. 690, 697-698 (W. D. Mo. S. W. D.).

Commerce Issues.

4. The Board argues that it had jurisdiction here because "an extension of petitioners' boycott of Wadsworth to other users of Wadsworth products would result in substantial curtailment of Wadsworth's interstate business" (Br. in Opp., p. 13). The Board cites no record references to support this statement. The Board made no such findings nor did it base its jurisdiction on any such theory. So far as the record shows, Klassen may

have been the only erector-dealer of Wadsworth houses. All the other houses may have been erected by Wadsworth itself (cf. Tr. 369-370, 612-613, 641, 659). And if there were other erector-dealers there was no showing, and the Board made no finding, that the conduct of the petitioners showed a probability that they would boycott such other erector-dealers. A court cannot supply jurisdictional findings. *Yonkers* v. *United States,* 320 U. S. 685, 689-692.

The Board argues that since the Act made secondary boycotts illegal they are within the Board's jurisdiction (Br. in Opp., p. 13, n. 7). But the Act only illegalized those secondary boycotts which affected commerce by causing or tending to cause a cessation of the flow of goods across state lines. The instant boycott had no such effect on commerce. (See Pet. for Cert., pp. 42-44.)

The assumption made in the Brief in Opposition that the Board will in the future abandon its prior inconsistent practices and exercise jurisdiction over secondary boycott cases which have no more relationship to commerce than the instant case, is unsupported by the release and the case cited (Br. in Opp., pp. 13-14). Neither mentions the subject of secondary boycotts. The cited material shows that the Board has established a new dollar yardstick by which to measure the inflow and outflow of employers over whom it will assert jurisdiction, but they do not indicate whether or not in secondary boycott cases that yardstick will be applied to the inflow and outflow of the secondary or of the primary employer. Logic requires that the yardstick be applied to the secondary employer. Otherwise there will exist an anomalous situation in which a labor dispute in a "local" business will be acted on by the Board if it involves a strike to boycott a "non-local" employer, but all other disputes

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement:	
A. The facts as found by the Board	4
B. The Board's conclusions	10
C. The Board's order	11
D. The proceedings in the Court of Appeals	12
Argument	12
Conclusion	25
Appendix	26

CITATIONS

Cases:

Bakery & Pastry Drivers and Helpers Local v. *Wohl*, 315 U. S. 769	15
Building Service Employees International Union v. *Gazzam*, 339 U. S. 532	15
Denver Building & Construction Trades Council, et al. v. *National Labor Relations Board* (not yet officially reported) pending on certiorari, No. 393, this Term	17-18
Denver Building & Construction Trades Council, et al., The Grauman Company, 87 NLRB, No. 136	10
Denver Building & Construction Trades Council and Henry Shore, 90 NLRB, No. 224, decided August 7, 1950	16
Eastern States Lumber Dealers Ass'n v. *United States*, 234 U. S. 600	17
Giboney v. *Empire Storage & Ice Co.*, 336 U. S. 490	15, 17
Hughes v. *Superior Court*, 339 U. S. 460	15
Humphrey v. *Local 294, International Brotherhood of Teamsters*, 25 LRRM 2318	21
International Brotherhood of Electrical Workers, Local 501, et al. and Samuel Langer, 82 NLRB 1028, enforced *sub. nom. International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 181 F. 2d 34, pending on petition for certiorari No. 108, this Term	13, 14, 18
International Brotherhood of Teamsters, etc., Local 294 and Conway's Express, 87 NLRB, No. 130	20, 21
International Brotherhood of Teamsters v. *Hanke*, 339 U. S. 470	15

Cases—Continued

	Page
Local 74, United Brotherhood of Carpenters, et al., and Ira A. Watson Co., 80 NLRB 533, enforced *sub nom. National Labor Relations Board* v. *Local 74, United Brotherhood of Carpenters, et al.*, 181 F. 2d 126, pending on petition for certiorari, No. 85, this Term	13, 18
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	24
National Labor Relations Board v. *Express Publishing Company*, 312 U. S. 426	23
National Union of Marine Cooks and Stewards, et al., and Irwin-Lyons Lumber Co., 87 NLRB, No. 9	20
National Labor Relations Board v. *Mexia Textile Mills, Inc.*, 339 U. S. 563	24
National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261	24
Printing Specialties & Paper Converters Union, Local 388 v. *Le Baron*, 171 F. 2d 331	14
Stanislaus Implement & Hardware Co., Ltd., 91 NLRB, No. 116, October 3, 1950	14
State v. *Hilbish*, 59 Nev. 469	22
State v. *Long-Bell Lumber Co.*, 321 Mo. 461	22
United Brotherhood of Carpenters and Joiners of America v. *Sperry*, 170 F. 2d 863	14
United States v. *Women's Sportwear Ass'n*, 336 U. S. 460	13

Statutes:

Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*)	2
Section 2 (6) and (7)	12
Section 8 (b) (4)	22
Section 8 (b) (4) (A)	3, 11, 16, 18, 20
Section 8 (c)	14, 15, 16, 24
Section 10 (b)	26
Section 10 (c)	26
Section 10 (e)	27
Section 10 (l)	21
61 Stat. 633, as amended, 62 Stat. 859, 1 U. S. C., Supp. III, Sec. 1	22

Miscellaneous:

National Labor Relations Board Release, October 6, 1950	14

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 387

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., AND WALTER A. SAID, AS AGENT FOR UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 302-309) is reported at 184 F. 2d 60. The findings of fact, conclusions of law, and order of the National Labor

Relations Board (R. 71-96, 21-58) are reported at 81 NLRB 802.

JURISDICTION

The decree of the court below was entered on September 9, 1950 (R. 310-312). The petition for a writ of certiorari was filed on October 27, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C., Supp. III, 141, *et seq.*), not contained in the Appendix to the petition (pp. 59-61), are set forth in the Appendix hereto, *infra,* pp. 26-28.

QUESTIONS PRESENTED

The Board found that petitioners conducted a secondary boycott in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act against Wadsworth Building Company, Inc. (herein called Wadsworth), by inducing and encouraging the employees of Klassen & Hodgson, Inc. (herein called the Klassen Company), and of other employers who transacted business with the Klassen Company to engage in a strike or concerted refusal to perform services for their respective employers with an object of requiring the Klassen Company to cease using the prefabricated houses made by Wadsworth and to cease doing

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business with Wadsworth. Petitioners induced or encouraged the boycott of Wadsworth by picketing at the situs of the Klassen Company's construction project, by listing the Klassen Company as "unfair" on its "We Do Not Patronize" list and circulating the list among affiliated or associated unions, and by orally inducing an employee of the Klassen Company to cease work. The questions presented are:

1. Whether there was sufficient effect upon commerce for the Board to exercise jurisdiction over the unfair labor practice.

2. Whether the secondary boycott of Wadsworth was beyond the reach of Section 8 (b) (4) (A) because accomplished through the peaceful picketing of the Klassen Company, the listing of the Klassen Company as unfair and the oral inducement of an employee of the Klassen Company to quit work.

3. Whether the Board could properly find that the strike against Klassen, which was designed to coerce Wadsworth, was secondary rather than primary in nature within the meaning of Section 8 (b) (4).

4. Whether the Board's finding that petitioners induced the employees of any employer to engage in a secondary boycott is supported by substantial evidence.[1]

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[1] The question raised by petitioners as to whether an inducement to single employees of separate employers would violate

5. Whether the Board's order was unduly broad because it restrained petitioners from undertaking further secondary boycotts against Wadsworth by applying pressure to other employers than Klassen.

6. Whether settlement of the primary dispute between Wadsworth and the union, and the withdrawal of the Klassen Company from the construction industry, render the Board's order moot.

STATEMENT

A. *The facts as found by the Board* [2]—Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on February 18, 1949, issued its findings of fact, conclusions of law, and order. The pertinent facts may be summarized as follows:

Petitioner, United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and Vicinity, A. F. of L. (herein called Carpenters), is a labor organization composed of representatives of the several local unions of Carpenters and Joiners of America whose members are employed in the building trades industry and in industrial establishments in the Kansas City metropolitan area (R. 24; 207, 254). Petitioner

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the statute is not properly presented in view of the evidence showing that the inducement was directed to all employees of Klassen and his suppliers.

[2] In the Statement, record references which precede the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

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Said is business agent for Carpenters (R. 25; 221). Carpenters, and other American Federation of Labor unions which represent employees engaged in the building trades and related industries, are affiliated with the American Federation of Labor's Building and Construction Trades Council (herein called Building Trades Council) for the Kansas City metropolitan area (R. 24-25; 225).

Wadsworth is engaged at its plant in Overland Park, Kansas, in the Kansas City metropolitan area, in the manufacture of prefabricated houses (R. 23; 120). During the year preceding the hearing before the Board, Wadsworth purchased raw materials valued at about $180,000 from sources located outside of Kansas and sold and shipped prefabricated homes valued at about $135,000 to purchasers located outside of Kansas (R. 23; 120-122).

In July, 1947, the Klassen Company, a corporation engaged in the construction and sale of houses near Overland Park, Kansas, made arrangements with Wadsworth for the purchase of about 15 prefabricated houses. These were to be delivered to the Klassen Company's building site upon order. (R. 23; 122-123, 143.)

In August, 1947, in consequence of a dispute with Wadsworth over contract terms, Carpenters called a strike of Wadsworth's production and maintenance employees (R. 26-28; 232-238).